182

No. 10-867

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

CARL J. MAYER, PETITIONER

v.

BILL BELICHICK; THE NEW ENGLAND PATRIOTS; NATIONAL FOOTBALL LEAGUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. RESPONDENTS DO NOT DENY THAT THIS CASE IMPLICATES IMPORTANT ISSUES OF NATIONAL LAW AND POLICY AND THEREFORE THIS COURT SHOULD GRANT THE PETITION. 2

II. RESPONDENTS WRONGLY DENY THE CONFLICT BETWEEN THE THIRD CIRCUIT BELOW AND OPINIONS IN THE LOWER COURTS OF OTHER CIRCUITS THAT ACCORD FANS FEDERAL AND STATE LEGAL PROTECTIONS. 6

III. THE THIRD CIRCUIT OPINION CONFLICTS WITH SUPREME COURT PRECEDENT OF *AMERICAN NEEDLE* AND RESPONDENTS ADMIT THAT FEDERAL RICO CLAIMS WERE PLED AND ARGUED BELOW. 8

IV. RESPONDENTS UNDERMINE THEIR OWN POSITION BY RELYING ON THIS COURT'S DECISION IN *MARRONE* INTERPRETING STATE LAW WHILE AT THE SAME TIME MAINTAINING THAT THIS COURT CANNOT OPINE ON STATE LAW AND THEREFORE SHOULD NOT GRANT CERTIORARI. 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

AMERICAN NEEDLE INC. V. NATIONAL FOOTBALL LEAGUE, ET. AL., 130 S.CT. 2201 (2010) 8
BROTHERSON V. PROFESSIONAL BASKETBALL CLUB, L.L.C., 604 F. SUPP. 2D 1276 (W.D.WASH.2009) 7
MARRONE V. WASHINGTON JOCKEY CLUB OF DISTRICT OF COLUMBIA, 227 U.S. 633 (1913) 9

RULES

Supreme Court Rule 10(c) 3

STATUTES

18 U.S.C. 1961 9

Respondents do not want this Court to grant Mayer's petition so that the NFL and its constituent teams can continue to operate a twenty-first century multi-billion dollar business – the largest in American sport – within a framework of nineteenth century law that grants virtually no rights to ticket-holders/consumers.

The hard truth is that a boy's game has become a man's industry. But the NFL and its teams want the revenues of a heavily subsidized and protected major industry while treating their customers like vassels with no rights.

Consumers of virtually every other product have some federal or state recourse in the event they are sold damaged goods: adulterated food, fraudulent securities, defective toys, dangerous chemicals, misleadingly advertised events, and even misleading service sector products are just some examples. Tickets to professional sporting events remain perhaps the last product in America where not even the most elemental rights are accorded the purchaser.

This view however, has been challenged by federal and state courts in other Circuits and the resulting conflict makes this case ripe for review. In addition, the opinion below conflicts with Supreme Court precedent and there are important questions of national law and policy implicated that favor granting Mayer's petition.

I. RESPONDENTS DO NOT DENY THAT THIS CASE IMPLICATES IMPORTANT ISSUES OF NATIONAL LAW AND POLICY AND THEREFORE THIS COURT SHOULD GRANT THE PETITION.

In their brief, Respondents essentially argue that Mayer's lawsuit is a case of first impression. Respondents point to language used by the Third Circuit, and also cited by Mayer in his petition, indicating as much:

- "This highly unusual case..." Pet. App. 2a.
- "It does appear that the various (and numerous) decisions cited by the District Court and the parties on appeal are distinguishable from the highly unusual (and even unique) circumstances present here. Simply put, no one in the past has ever brought a legal action quite like this one." Pet. App. 14a.
- "Although the factual circumstances and claims before this Court appear to be rather unique..." Pet. App. 20a.
- "... unusual and even unique circumstances presented by this appeal." Pet. App. 28a.

Respondents spend the majority of their brief arguing that this Court should not hear Mayer's case because Mayer has not identified a conflict among Circuits or a conflict between the Third Circuit's decision and any of this Court's decisions.

Even if, *arguendo*, case law is not seen as comprising a conflict among the Circuits, the sweep of the Third Circuit's ruling that no remedy at law or equity exists for a ticket-holder in such circumstances is so broad in its scope (pertaining to nearly every professional sports league) as to, *per se*, comprise a crucial issue of public policy underpinning ticket-holders' legal rights. Since the Third Circuit has effectively held that no right or remedy lies at law or equity in such conditions, a significant legal issue arises as a matter of course.

Respondents ignore the fact that this Court may exercise its judicial discretion to consider cases in which a United States Court of Appeals has decided an important question of federal law or public policy that has not been, but should be, settled by this Court. *See* Supreme Court Rule 10(c).

That the Third Circuit emphasized that Mayer's case is *sui generis* merely underscores the importance of resolving the question of whether ticket-holders' rights reside outside the law. In affirming the District Court's dismissal of Mayer's case by ruling, "[u]nder the circumstances, public policy considerations weigh against Mayer and his various claims" (Pet. App. 27a), the Third Circuit effectively decided an important question of federal law and public policy.

Specifically, the Court ruled that ticket-holders have no legal remedy when they pay money to see admittedly rigged sporting events carried out in violation of NFL rules[1]. This important question has not been settled by this Court. Not one of the plethora of cases cited by Respondents in their briefs filed before this Court, the Third Circuit, or the District Court purports to be a decision of this Court settling this important question of federal law and public policy.

This question should be settled by this Court. The NFL's contract with ticket-holders, as construed by the Third Circuit, is a uniform, national instrument that affects the rights of all ticket-holders equally wherever they reside or attend NFL events.[2] This factor alone renders this issue appropriate for this Court's review. The NFL's own disciplinary actions have also failed to deter ongoing episodes of cheating as described by Mayer in his petition[3]. Respondents did not dispute this important point in their Brief in Opposition and thereby concede it. It is clear that it will take a decision by this Court to settle the matter once and for all.

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[1] "We do not condone the conduct on the part of the Patriots and the team's head coach, and we likewise refrain from assessing whether the NFL's sanctions (and its alleged destruction of the videotapes themselves) were otherwise appropriate." Pet. App. 28a.

[2] The ruling below also arguably disenfranchises any ticket-holder to any professional sporting event that is rigged or played in violation of the established rules of that league.

[3] *See* Pet. Br. 13, 14 for a description of "Spygate II" which resulted in the firing of the Denver Broncos' head coach after it was discovered that his team conducted similar illegal videotaping.

Respondents Brief in opposition also attempts to minimize the nature of the infraction here by attempting to characterize this litigation as one based on "disappointed subjective expectations." Res. Br. 4. To the contrary, this case is about an objective violation of the NFL's own rules which gives rise to a breach of the ticket-holders' contract. As NFL Commissioner Goodell stated upon learning of the Patriots ongoing cheating: "[t]his episode represents a calculated and deliberate attempt to avoid longstanding rules designed to encourage fair play and promote honest competition on the playing field." Pet. App. 6a, Pet. Br. 8.

There is nothing subjective about this case: the New England Patriots for many years, and with the systematic and ongoing blessing of the entire organization, cheated in direct violation of the NFL's rules. Furthermore, the type of rule violated by the Patriots is classified as an "integrity of the game" rule. The national question of whether consumers have a remedy at law when they purchase tickets to an NFL game that is rigged and played contrary to the NFL's most sacrosanct "integrity of the game" rules can only be decided by this Court. Since the Third Circuit ruled effectively as a matter of judicial policy on a nationally uniform NFL ticket-holder contract, this matter is appropriate for this Court's review.

II. RESPONDENTS WRONGLY DENY THE CONFLICT BETWEEN THE THIRD CIRCUIT BELOW AND OPINIONS IN THE LOWER COURTS OF OTHER CIRCUITS THAT ACCORD FANS FEDERAL AND STATE LEGAL PROTECTIONS.

Respondents want to pretend that there is no conflict between the Third Circuit's opinion below and a developing body of law in the lower courts in other Circuits that gives legal protections to ticket-holders/consumers of professional sports leagues.

The NFL and its teams enjoy massive 21st century revenue from their fan base, but simultaneously want to ensure that their consumers remain under a parsimonious regime of 19th century law that allows fans only a "revocable license" to attend games. Increasingly, federal courts reject this untenable position.

For the last two decades, federal and state courts in other Circuits have held that the rights of ticket-holders/consumers should no longer be cabined by ancient 19th century doctrines. The Third Circuit below, somewhat reluctantly, took a different position. Now is the appropriate time for the Supreme Court to resolve these issues that have been surfacing in litigation for twenty years.

Respondents simply do not want to accept, or have this Court address, how courts in other Circuits have extended protections to ticket-holders/consumers over time. Respondents in their papers repeatedly refer to the "alleged breach of contract" and "alleged

contractual option to renew season ticket package" and "alleged contractual right of season ticket package holder to renew season ticket package" Res. Br. 6.

These rights are not "alleged": they are actual rights conferred by lower federal and state courts in other Circuits on ticket-holder/consumers who have been defrauded or had their season ticket contract rights abrogated by over-reaching NFL owners. Numerous cases now extend these protections to fans of professional sports leagues who pay hard-earned money and loyally attend the games of their favorite teams. Pet. Br. 16-20, Pet. App. 19a, 20a.

As the federal District Court judge ruled in *Brotherson v. Professional Basketball Club, L.L.C.*, 604 F. Supp. 2d 1276 (W.D.Wash.2009): "if a reasonable consumer understood that he or she was buying nothing other than the right to be subject to the unfettered whim of the [the defendant professional basketball team] then no one would have entered into a season ticket package." Pet. Br. 17.

These more modern cases have moved away from the outmoded common law doctrine of "revocable licenses" and firmly recognize that modern day consumers of sporting events enter into elaborate and expensive season ticket contracts. The season tickets packages that modern professional sports teams sell bear no more resemblance to 19th century revocable seat licenses than modern computerized automobiles resemble the horse and buggy.

Since federal courts in other Circuits have found that there exist protections for season ticket holders

against misleading statements by owners, the question that Petitioners seek to have reviewed is whether season ticket holders like Mayer should have protections against paying to witness a game admittedly played in violation of the NFL's own rules. Said question is ripe for review.

III. THE THIRD CIRCUIT OPINION CONFLICTS WITH SUPREME COURT PRECEDENT OF *AMERICAN NEEDLE* AND RESPONDENTS ADMIT THAT FEDERAL RICO CLAIMS WERE PLED AND ARGUED BELOW.

Respondents try to claim that *American NeedleInc. V. National Football League, Et. Al. , 130 S.Ct. 2201 (2010)* was simply a narrow interpretation of anti-trust law. Res. Br. 5. In fact, *American Needle* went to the question of whether federal anti-trust law governed the conduct of the NFL and its teams or whether the league was exempt from federal supervision. The clear import of the decision was whether the NFL is exempt from the normal operation of the law. This Court rejected the NFL's contention that as a self-governing entity it was beyond the reach of law.

This is strikingly similar to the question of whether the federal RICO statute governs the conduct of NFL teams participating in and covering up fraud and racketeering such that spectators witness games that are not played according to NFL rules.

Respondents admit in their papers that federal RICO was pled and reviewed on appeal, thereby making it a live issue in this case. Res. Br. 5

("[Petitioners] only federal law claim was based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961")

IV. RESPONDENTS UNDERMINE THEIR OWN POSITION BY RELYING ON THIS COURT'S DECISION IN *MARRONE* INTERPRETING STATE LAW WHILE AT THE SAME TIME MAINTAINING THAT THIS COURT CANNOT OPINE ON STATE LAW AND THEREFORE SHOULD NOT GRANT CERTIORARI.

Respondents, in their brief, contradict themselves.

Respondents proclaim that *Marrone v. Washington Jockey Club of District of Columbia*, 227 U.S. 633 (1913) is valid and binding precedent, even though it turned on a state law issue of whether a ticket to a racetrack constitutes a contract or a revocable license. Res. Br. 4.

At the same time Respondents urge this Court not to grant certiorari because it ought not to reviews questions of state law. Res. Br. 7-8.

As *Marrone* teaches, it is accepted practice for this Court to analyze the applicability of state law. It is even more important in this instance because of the far-reaching national legal and policy implications of

denying any rights to any ticket-holders of professional sporting events.[4]

To the extent that the Third Circuit opinion below and this Court's decision in *Marrone* federalized the law of ticket-holder rights, this Court should revisit the outmoded precedent of *Marrone*. Pet. Br. 22.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondents claim that Petitioner waived this argument is false as the Third Circuit *sua sponte* relied on *Marrone* for the proposition that tickets to sporting events are merely revocable licenses with no other rights attached.

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